4/13/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CERTIFIED OIL COMPANY,	)	DOCKET NO. RUST-006-1991
	)	
Respondent	)	
	)	

ORDER DENYING MOTION FOR DEFAULT JUDGMENT
AND SETTING FURTHER PROCEDURES

This proceeding was initiated on June 5, 1991 by a Complaint issued by the United States Environmental Protection Agency (EPA), Region V (Complainant), pursuant to Section 9003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6991(e)(a). The Complaint alleges that Respondent failed to follow required procedures subsequent to releases which occurred during the closure of underground storage tanks at six of its facilities, and proposes a civil penalty of $212,264 be assessed for the alleged violations.

Subsequently, Complainant filed a Motion for Default Judgment pursuant to Section 22.17 of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.17. This motion is based on the grounds that Respondent did not file its prehearing exchange information by the due date of October 7, 1991, which was set in the Order Setting Prehearing Procedures. The Complainant notes in the motion that it has filed the prehearing exchange material and that Respondent continues in its failure to file its prehearing exchange information. As a result, Complainant requests that a default order assessing the civil penalty noted above be entered against Respondent for violations of the Section 9003 of RCRA,

and the regulations promulgated thereunder.

Respondent submitted a response opposing the Motion for Default, in which Respondent avers that it has complied with all the requirements of the Order Setting Prehearing Procedures. Respondent contends that the information required under paragraph numbered 1 of this Order were made when the "Certified Oil Company Site Closure Data", presented as exhibits in Complainant's prehearing exchange, were submitted to the Agency in January and February of 1991. Respondent maintains that these documents and the settlement conference held on July 24, 1991, provided Complainant with notice of the nature and theory of Respondent's defenses to the Complaint. Further, Respondent asserts that other requirements of the Order Setting Prehearing Procedures have been fulfilled because the Respondent submitted a request for hearing location on July 30, 1991, and does not claim an inability to pay.

On analysis, it is clear that the Respondent did not file prehearing exchange material by October 7, 1991 in the form required by in the Order Setting Prehearing Procedures. And, Section 22.17(a) of the Rules provides that a party may be found to be in default "(2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer. . ." However, the Respondent's violation may be characterized as technical or de minimis, as the substance of the data required by the Order Setting Prehearing Procedures was provided to the Complainant by information previously provided to

the Agency. A technical or de minimis violation by the Respondent is not sufficient to warrant the entry of a default against it and, as a matter of discretion, a default will not be entered. The rationale for this ruling follows.

As a general rule in Federal court, default judgments are not favored and cases should be decided upon their merits whenever reasonably possible, Eitel v McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986); Wilson v. Winstead, 84 F.R.D. 218, 219 (E.D. Tenn. 1979). Also, it is clear that disposition of a request for default judgment lies within the court's sound discretion, and that, inter alia, consideration should be given to whether any prejudice has occurred to the party seeking the default judgement, 6 Moore's Federal Practice ¶ 55.05[2] (1990). Further, it is pertinent to note that:

> Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is reason to believe that defendant's default resulted from bad faith in his dealings with the court or opposing party, the district court may properly enter default and judgment against defendant as a sanction. Id.

Administrative decisions under the environmental statutes are generally consistent with Federal court precedent on the issue of default judgments. Thow Products Co., Docket No. EPCRA-VII)-90-04, Order Denying Motion for Default Judgment issued March 6, 1991; ROI Development Corp., Docket No. RCRA-3008)-VII-90-12, Several administrative default judgments have been granted, where, in contrast to this proceeding, there was either no response to a motion for default, In re Watervliet Paper

Company, Inc., Docket No. TSCA-V-C098-88, Order on Default, issued August 21, 1989; no response to either the complaint or the motion for default, In re Katzson Brothers, Inc., Docket No. IF&R-VIII-149, Default Order, issued July 2, 1985, FIFRA Appeal No. 85-2, Final Decision, issued November 14,1985; In re Midwest Bank and Trust Company, et al., Docket No. V-W-86-R-82, Final Order upon Default, issued September 29,1989; or Respondent willfully failed to comply with prehearing exchange orders. In re Electric Utilities Company, Docket No. TSCA-V-C-011, Order on Default, issued February 13,1985; In re Camax Engineering, Inc., et al., Docket Nos. TSCA-PCB-VII-88-09 and TSCA-PCB-VIII-88-21, Default Order issued June 19,1989. On the other hand, a motion for default order was denied where a respondent submitted a prehearing exchange fourteen days after it was due, and there was "no contumacy, bad faith, or supine indifference shown by respondent," In re Cavedon Chemical Co., Inc., Docket No. TSCA-89-H-20, Order issued February 16, 1990.

Similarly, the Respondent in this proceeding has not demonstrated any contumacy, bad faith or indifference to justify a default being entered against it. In addition, Complainant has not shown any prejudice to its case from the technical default. Accordingly, the Complainant's motion for default must be, and hereby is, denied.

However, the Respondent should comply with the requirements of the prehearing exchange in the manner provided for in the Order Setting Prehearing Procedures, particularly those

requirements in paragraph numbered 1 thereof. Accordingly, the Respondent shall complete its prehearing exchange in the form established in the Order Setting Prehearing Procedures, within 30 days of the service date of this Order. Further, the parties are directed to confer and file a status report in writing on or before June 1, 1993, which report shall contain a statement on the current status of settlement negotiations and a suggested further procedural schedule.

SO ORDERED.

Daniel M. Head,
Administrative Law Judge

Dated: April 13, 1993
Washington, D.C.

IN THE MATTER OF CERTIFIED OIL COMPANY, Respondent
[UST] Docket No. RUST-006-1991

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion for Default Judgment and Setting Further Procedures, dated March 13, 1993, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

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Copy by Certified Mail, Return Receipt Requested to:

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Aurora Jennings
Secretary

Dated: April 13, 1993
Washington, D.C.